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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 188

FRANK M. JORDAN, Secretary of State, of the State of California,
Petitioner,

vs.

S. E. WEAVER, D. E. O'NEIL and T. F. GREENHOW,
Respondents.

Brief of International Telemeter Corporation, Amicus Curiae, in Opposition.

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Brief of International Telemeter Corporation, Amicus Curiae, in Opposition.

The parties hereto having consented to the filing of this brief, International Telemeter Corporation respectfully submits the same as a friend of the Court and respectfully suggests that the Writ be denied upon the grounds and for the reasons hereinafter set forth.

Interest of the Amicus Curiae.

The interest of this amicus curiae (hereinafter Telemeter) in this action and in the questions presented arises from the fact that it is engaged in the business of manufacturing, developing, improving and selling assembled components, known as "telemeter systems," for the origination, transmission and reception of pay television programs in private homes in California and elsewhere and in the business of selling franchises to others to use its equipment in the presentation of such programs. The so-called "Free Television Act" (1 Cal. Stats. 1965, p. A-132) has deprived Telemeter of its

market for the sale of its said equipment and franchises in California. A substantial part of such equipment, particularly distributors' units and home receiving units, including patented electronic pay metering and recording equipment, is manufactured in Pennsylvania and Illinois and thereafter shipped to California for assembling. The Act also deprives Telemeter of the right, under its articles of incorporation and its certificate of qualification to do business in California, to use pay television systems in California in selected test areas for the proper and necessary development and improvement of its said pay television telemeter systems and the components thereof destined for sale in interstate commerce and, but for said Act, in California. Telemeter and its predecessors in interest in the carrying on of said business have expended over $5,000,000 in the last 15 years in the development of said business.

For the reasons given, Telemeter is vitally interested in the question of whether the Act is unconstitutional, as held by the Supreme Court of California, or the reverse, as contended by Petitioner.

The Grounds for the Denial of the Writ.

These are:

I. Jurisdiction.

It is respectfully suggested that the Court should decline jurisdiction for the reason that the Supreme Court of California decided the cause upon an adequate and independent nonfederal ground: That the "Free Television Act" abrogates freedom of speech and of expression within the intendment of Section 9 of Article I of the Constitution of California. *Jankovich v. Toll Road Commission*, 379 U.S. 487, 489-90.

II. Merits.

The Supreme Court of California decided the federal question relating to the abrogation by the "Free Television Act" of freedom of speech and of expression in a manner wholly in accord with applicable decisions of this Court.

Summary of the Argument.

As regards the question of jurisdiction, the California Supreme Court's judgment rests upon an adequate and independent nonfederal ground, namely, that the Act is obnoxious to Section 9 of Article I of the California Constitution which guarantees freedom of speech as a matter of state law. This is not a situation where, as the cases say, the state ground is so interwoven with the federal as to sustain the Court's jurisdiction. On the contrary, the intention of the California court to adjudicate the unconstitutionality of the offending statute under state law is clear; and the adequacy of this ground to uphold the judgment is not open to question. Moreover, the California Supreme Court has held that the coverage of its Section 9 of Article I is broader than that of the First Amendment, which is but another way of saying that the "Free Television Act" independently and *a fortiori* offends Section 9 of Article I. The result is that the state court's holding as to Section 9 of Article I presents a clear example of an adequate and independent state ground of decision.

Turning to the merits, the suppression by the "Free Television Act' of the proscribed medium is complete; the Act amounts to total censorship, in advance, so far as transmission to and reception in the home are concerned. There are two cardinal principles which are fundamental in a free speech case. The first is that

plausible or colorable justifications which might support a legislative prohibition of certain activities in the ordinary fields of commerce and industry will not suffice where freedom of expression is denied. The second is that where, as here, a statute prohibits freedom of speech or of expression in advance, it comes before the courts bearing a heavy presumption *against* its validity. The "Free Television Act" is therefore to be evaluated as to its constitutionality, not only without benefit of any presumption as to its validity, but rather burdened with a strong presumption running in the other direction.

The First Amendment protects both the means and the content of communications to others. It protects the right of the public to see, to listen and to hear, as well as the right of a given medium to disseminate material of general interest. It protects not some, but all means and media of expression, and it protects communications made in the course of commercial endeavor. Accordingly, it may not be evaded by prohibiting the sale or distribution of protectible material.

The Act evidences, not a valid attempt to regulate a business, but rather an attempt to suppress a qualified medium for the dissemination of news, views and entertainment. The Act is no more valid as a prior restraint than would be an enactment forbidding home distribution of newspapers to their paid-up subscribers. The suppression of freedom of speech and of expression implicit in the Act is wholly without justification or valid excuse. The Act fails to meet either the clear and present danger test or the *ad hoc* balancing test, from which it follows that the action of the California Supreme Court in voiding the statute is wholly in accord with applicable decisions of this Court.

ARGUMENT.

I.

THE SUPREME COURT OF CALIFORNIA HELD, AS AN INDEPENDENT AND ADEQUATE NONFEDERAL GROUND OF DECISION, THAT THE ACT IS OBNOXIOUS TO SECTION 9 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION.

The California Constitution contains its own guarantees of freedom of speech and of expression. Section 9 of Article I provides:

> "Sec. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

It has been said that the protective coverage of Section 9 is broader than the guarantees of the First Amendment. *Dailey v. Superior Court,* 112 Cal. 94.* The *Dailey* case was a proceeding in certiorari to review the action of the San Francisco Superior Court in issuing an order requiring the petitioner to cease and desist from the presentation of a play assertedly based upon the facts of a criminal trial then pending. The writ annulling the lower court's action was granted and the California Supreme Court, speaking of Section 9 of Article I, had this to say:

> ". . . The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as

**Daily v. Superior Court* was cited in *Near v. Minnesota, infra,* 283 U.S. at 719, n. 11, as to the constitutional impropriety of prior restraints.

> to freedom of speech varies somewhat from that of the constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, *for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted.*"* (112 Cal. at 97-98.)

This is the equivalent of saying that an abridgment of the First Amendment guarantee of free speech is independently and *a fortiori* obnoxious to Section 9 of Article I.

It was in the light of these principles of California law that the California Supreme Court held in the instant case:

> "... For reasons which will appear, we have concluded that the trial court correctly determined the Act to be invalid as an abridgement of the free speech guaranties of *state* and federal constitutions." (*Weaver v. Jordan*, 64 Adv. Cal. 243; Petition, Appendix B, 17.)

In addition to the decisions of this Court, the California Supreme Court cited the following California cases dealing with the free speech guarantees of both the state and federal constitutions. *Katzev v. County of Los Angeles*, 52 Cal.2d 360, 365; *American Civil Liberties Union v. Board of Education*, 55 Cal.2d 167, 171; *Wrather-Alvarez, etc., Inc. v. Hewicker*, 147 Cal.App. 2d 509, 512; *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 908-909; *Canon v. Justice Court*, 61 Cal.2d 446, 451.

*Emphasis here, as elsewhere, is supplied unless otherwise noted.

The California court also stated the trial court's holding in the following language:

> ". . . The trial court concluded that the Act abridges both the state and federal constitutional guarantees of free speech. (U.S. Const., Amendments I and XIV; Cal. Const., Art. I, § 9.)"

And it was the trial court's judgment predicated upon these twin conclusions, which the state supreme court upheld, upon the same grounds.

In these circumstances the present case falls squarely within the pattern of such cases as *New York City v. Central Savings Bank*, 306 U.S. 661 (and see opinion below, 280 N.Y. 9, 10) and *Jankovich v. Toll Road Commission, supra*, 379 U.S. 487. The situation presented in each of those cases was identical with the situation here: the state court, there as here, had held a statute unconstitutional on both federal and state grounds. In the *Central Savings Bank* case certiorari was denied *per curiam* for that reason; in *Jankovich* the writ was dismissed as having been improvidently granted, 379 U.S. at 489, 495.

Jankovich completely answers the contention made by petitioner Jordan that the state ground is so interwoven with the federal as to render the Court unable to conclude that the judgment rested upon an independent application of state law.*

In *Jankovich*, the Court said:

> "As we have concluded that respondent is correct in its contention that the judgment sought to be re-

*The remedy in such a situation — which is *not* the situation here — would seem to be to send the cause back to the lower court for clarification. See, *e.g.*, *Minnesota v. National Tea Co.*, 309 U.S. 551; and see dissenting opinion in the case under discussion: *Jankovich*, 379 U.S. at 495-496.

viewed is supported by an independent and adequate state ground, we dismiss the writ of certiorari as improvidently granted.

"In the Indiana Supreme Court respondent relied on the just compensation requirement of the Indiana Constitution as well as on the Due Process Clause of the Fourteenth Amendment. The Indiana Supreme Court stated the issue for decision as whether 'the ordinance purport[s] to effect a taking of private property for public use in violation of the provisions of Article 1, § 21, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.' 244 Ind., at 577, 193 N.E.2d 238. In resolving that issue, however, the Indiana Supreme Court, quite understandably, did not analyze separately the effect of the two provisions but considered them together. From that fact petitioners would have us conclude that the state ground of decision—invalidity of the zoning ordinance under Art. I, § 21, of the Indiana Constitution—'is so interwoven with the other as not to be an *independent matter*. . . .' *Enterprise Irrig. District v. Canal Co.*, 243 U.S. 157, 164 (dictum). (Emphasis added.) We cannot agree." (379 U.S. at 489-490.)

Following further discussion and analysis of the state court's decision, the Court then went on to hold, in language fully applicable here, that "[I]ndeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision." 379 U.S. at 491.

For the reasons given, it is respectfully suggested that certiorari should be denied because the decision below is based upon an independent and adequate non-federal ground.

II.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS WHOLLY IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The key question presented on the merits concerns the muzzling of free speech evidenced by the subject California statute, namely, the so-called "Free Television Act," adopted as an initiative measure at the general election held in California on November 3, 1964.

The purpose and effect of the Act is to outlaw subscription or pay television to the home through the means of suppressing this medium of communication. In addition, the statute avowedly discriminates in favor of what it is pleased to term "free television"—which is to say commercially sponsored television—transmitted for home consumption. And, *sub silentio,* it also discriminates in favor of pay television transmitted for viewing by theatre audiences.

These discriminatory features, however, are secondary. The basic vice of the measure consists, as indicated above, in its arrant suppression of freedom of speech and of expression; and it is to this vice, fatal to the validity of the statute, that this brief is directed so far as the merits are concerned. We shall show, in this regard, that the decision of the California Supreme Court is wholly in accord with applicable decisions of this Court.

A. The So-Called "Free Television Act" Abrogates Freedom of Speech and of Expression Within the Intendment of the First Amendment to the Constitution of the United States, as Made Applicable to State Action by the Due Process Clause of the Fourteenth Amendment.

The Act is quite clear that no one may speak or disseminate ideas to the home through the medium of pay television; it is equally clear that, *ex necessitate,* no one, in the home, may listen to a pay television transmission or receive transmitted ideas or images conveying such ideas over the outlawed medium. The suppression of the proscribed medium as a vehicle of transmission to the home is complete; it amounts to total censorship, in advance, so far as home viewers are concerned. The bar is as absolute as would be an enactment prohibiting the circulation to the home of newspapers for which a price is charged. Authorities dealing with the abridgment of freedom of the press, as well as of speech, are therefore fully apposite here.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." And it is now settled that, since these rights are fundamental, the Fourteenth Amendment makes this proscription applicable to the states and to state action. *Near v. Minnesota,* 283 U.S. 697, 707; *Fiske v. Kansas,* 274 U.S. 380, 385; *Grosjean v. American Press Co.,* 297 U.S. 233, 243.

So, also, it is settled that communication by motion picture, by radio and by television are protected by the dual constitutional provisions safeguarding freedom of speech and of the press. *Rumely v. United States,* D.C. Cir., 197 F.2d 166, 177; *American Broadcasting Co.*

v. United States, S.D.N.Y. 110 F.Supp. 374, 389, aff'd 347 U.S. 284. And, by the same token, the right of free speech necessarily embodies the means used for its dissemination. *Saia v. New York,* 334 U.S. 558. Nor is the protection lost because a charge is made for the dissemination. *Cf. Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501: motion picture; *New York Times v. Sullivan,* 376 U.S. 254, 266: paid newspaper advertisement; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 64, n.6: pocket books.

At the threshold, and in view of certain of the contentions made by petitioner, it will be helpful to point out two cardinal principles which are fundamental in a free speech case.

1. Plausible or Colorable Justifications, Which Might Support a Legislative Prohibition of Certain Activities in the Ordinary Fields of Commerce and Industry, Will Not Suffice Where Freedom of Expression Is Denied.

The principle, frequently applied in so-called economic due process cases, that a statute will be upheld if any reasonable state of facts can be conceived which will sustain it, has no application to a statute denying free speech. This proposition has been made clear by this Court.

Thus, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639, the Court said:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it

also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. *Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.* The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.* They are susceptible of restriction only *to prevent grave and immediate danger to interests which the State may lawfully protect.* It is important to note that while it is the Fourteenth Amendment which bears directly upon the State, *it is the more specific limiting principles of the First Amendment that finally govern this case.*" (319 U.S. at 639.)

And in *Thomas v. Collins,* 323 U.S. 516, 530, the Court said:

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. *The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.* These rights rest on firmer foundation. *Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending.*" (323 U.S. at 530.)

And in *Griswold v. Connecticut,* 381 U.S. 479, it was said:

> "In other words, the State may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." (381 U.S. at 482.)

The short of it thus is that we are not dealing here with the mere regulation or suppression of business and industrial, which is to say *economic,* conditions which the legislative function, for reasons of its own, may deem offensive to the public welfare. On the contrary, we are dealing with an attempt by a state to outlaw a vehicle of free speech; a matter of far graver import.

That such is the operation and effect of the statute is not open to question. In *Near v. Minnesota, supra,* 283 U.S. at 708, the Court emphasized "that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its *operation and effect.*" Here, as in *Near,* the "object of the statute is not punishment, in the ordinary sense, but suppression" of the offending medium of communication. (283 U.S. at 711.)

Thus, judged by its operation and effect, as distinguished from its *motivation* as expressed in Section 2 of the statute, the Act suppresses free speech, the business of supplying news, views and entertainment via the proscribed medium and, last but far from least, the right of the viewing public to listen, to hear and to see. In such a situation, where personal liberties are concerned, this Court does *not,* in testing whether due process is offended, employ the formula of whether any

facts may be conceived which will sustain the offending legislation. As we have seen, the basic freedoms may not be infringed "on such slender grounds."

2. Where, as Here, a Statute Prohibits or Abridges Freedom of Speech or of Expression in Advance, It Comes Before the Courts Bearing a Heavy Presumption Against Its Validity.

This statute does more than censor or restrict, in advance, utterances over pay television, although that would be bad enough. It prohibits them entirely. In such circumstances it is not open to reasonable discussion that a heavy presumption lies *against* the validity of the measure. As this Court has said, "any system of prior restraints of expression comes before this Court bearing a heavy presumption against its validity." *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58, 70; *Freedman v. Maryland,* 380 U.S. 51, 57; *cf. Near v. Minnesota, supra,* 288 U.S. 697, 720.

It follows that this statute must be evaluated, as to its constitutionality in the light of the First Amendment, not only without benefit of any presumption as to its validity, but rather burdened with a presumption running in the other direction; and mere colorable justifications for the legislation will not suffice.

These fundamentals established, we now turn to the contentions raised in attempted justification of the subject statute.

B. The Attempts to Uphold the Validity of the Act Under the First Amendment Are Devoid of Merit.

Petitioner's case is that the State may, in the guise of regulation, prohibit a given means of communication, *i.e.*, pay teleision to the home. He denies that free speech is interfered with at all; one may speak or exhibit over television to his heart's content, he says, so long as no charge for the service is made to the viewer.

Petitioner's argument that the state may regulate by prohibiting a given means of expression strikes at the heart of the free speech guarantees of the First Amendment. This approach would lend sanction to the suppression of FM radio in favor of AM radio or newspapers or magazines; or, conversely, the suppression of any of the latter in favor of other media of communication.

Petitioner very nearly denies that one who, for a charge, supplies news or entertainment to the public, is entitled to the protection of the First Amendment. Under this reasoning, newspapers, magazines, motion pictures and other media operating on a commercial basis could be made the target for legislation such as that here under consideration. This argument proves far too much; it envisages, for instance, freedom of the *press* as encompassing nothing more than throwaway publications.

Thus it is no answer to say that all that is proscribed is the making of a charge for the right of others to hear or see the thoughts, ideas or opinions expressed through the television medium. This approach palpably evades the true object and effect of the Act, which is to suppress the expression of thoughts, ideas

or beliefs over the medium of pay television entirely. A similar statute in a related field could result in the suppression of paid circulation newspapers, periodicals or motion pictures. Once again the argument proves too much; it confuses the *means* of suppression with the *fact* of suppression.

With these preliminaries, we pass to a more detailed discussion of the points raised in attempted justification of the statute.

1. The First Amendment Protects Both the Means and the Content of Communications to Others.

The initial answer to petitioner's contentions is the proposition that the right of free speech necessarily embodies the *means* used for its dissemination, because the right is worthless in the absence of a meaningful method of its expression. *Saia v. New York, supra,* 334 U.S. 558; and *cf. Wollam v. Palm Springs,* 59 Cal. 2d 276, 284. Suppression of the means, therefore, is on a par with suppression of the content; and in the context of this case it is not open to reasonable discussion that the Act suppresses both the one and the other. And this, be it noted, wholly without reference to the content or manner of transmission or publication of the suppressed communications. No question is here raised as to program content: the definition of "Television Program" set out in Section 3 of the Act embraces both pay and commercially sponsored presentations. No question is raised, either, as to the manner of transmission or publication: closed or open circuit, precisely as commercially sponsored programs are or may be transmitted. The only objection is that pay television contemplates the making of a charge, precisely as does the conventional newspaper or movie house.

2. The First Amendment Protects Not Some, but All Means and Media of Expression.

The apparent thesis of petitioner that suppression of one means of communication is proper, so long as other means or media are left undisturbed, simply does not stand scrutiny. The camel may not thus get its nose under the tent; the guarantees of freedom of expression may not be whittled away one by one; *any* infringement of these guarantees will be promptly met and dealt with as it deserves. *Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. 495: censorship of motion picture; *Near v. Minnesota, supra,* 283 U.S. 697: censorship in advance of newspaper by injunction; *Grosjean v. American Press Co., supra,* 297 U.S. 233: discriminatory tax on newspapers, based on paid circulation; *Winters v. New York,* 333 U.S. 507: prohibition against distribution of crime news magazine; *Smith v. California,* 361 U.S. 147: possession by bookseller of book not known by him to be obscene; *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58: censorship per "index expurgatorius" of pocket books; *Saia v. New York, supra,* 334 U.S. 558: sound truck.

3. The First Amendment Protects Communications Made in the Course of Commercial Endeavor.

Every case upholding the right of conventional, paid-circulation newspapers, books and periodicals and, as well, motion pictures; to freedom of expression and freedom from censorship, particularly in advance; wholly condemns this statute and repels the attempt to justify it upon the ground that a charge is made for pay television transmissions.* That the guarantees of free-

*"It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania,* 319 U.S. 105, 111.

dom of speech and of the press extend to all such media in the business field is not even open to debate. See, *e.g., Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. 495; *Near v. Minnesota, supra,* 283 U.S. 697; *Grosjean v. American Press Co., supra,* 297 U.S. 233; *Winters v. New York, supra,* 333 U.S. 507; *Smith v. California, supra,* 361 U.S. 147, 150; *New York Times v. Sullivan, supra,* 376 U.S. 254.

Burstyn met the contention of petitioner in this regard head-on:

> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution and exhibition is a large-scale business conducted for private profit. We cannot agree. *That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."* (343 U.S. at 501, 502.)

Smith v. California was equally explicit;

> ". . . And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. *It is of course no matter that the dissemination takes place under commercial auspices.* See *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495; *Grosjean v. American Press Co.,* 297 U.S. 233. Certainly a retail bookseller plays a most significant role in the process of the distribution of books." (361 U.S. at 150.)

And in *New York Times v. Sullivan, supra,* it was said, speaking of a paid advertisement:

> ". . . It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N.A.A.C.P. v. Button,* 371 U.S. 415,435. *That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California,* 361 U.S. 147, 150; cf. *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58, 64, n. 6. . . ." (376 U.S. at 266.)

It is thus well settled that those engaged in the *business* of disseminating news, opinions, ideas or entertainment are entitled to the protection of such dissemination under the First Amendment. Thus the statute invalidated in *Winters v. New York, supra,* 333 U.S. 507, prohibited the sale of books or their possession with intent to sell. The statute invalidated in *Near v. Minnesota, supra,* 283 U.S. 697, interfered with the right to sell and distribute newspapers for profit. And so with *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. 58, in the case of pocket books. The tax invalidated in *Grosjean v. American Press Co., supra,* 297 U.S. 233, was held to have been aimed at curtailing the commercial distribution of newspapers and, moreover, was measured by the gross receipts from sales. The opinion in *Smith v. California, supra,* 361 U.S. 147, squarely upheld the right of a bookseller to have books in his possession for purposes of sale. *New York Times v. Sullivan, supra,* 376 U.S. 254, upheld the right to fair

comment through the medium of *paid* advertising. It is thus impossible to separate the throttling of sales from the resultant throttling of freedom of expression, as our adversary vainly attempts to do.

4. The First Amendment Protects the Right of the Public to Listen as Well as the Right of a Given Medium to Disseminate Material of General Interest.

Marsh v. Alabama, 326 U.S. 501, had to do with the attempted enforcement, in a "company" town, of a state statute making it a crime for anyone to enter or remain on the premises of another after having been warned not to do so. Appellant, a Jehovah's Witness engaged in distributing religious literature, was arrested under the statute and convicted. The Court reversed. Holding that the protection of the First Amendment extends to the right to listen as well as the right to speak, the Court said, speaking of the people of the town:

> *". . . To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is curtailing these freedoms with respect to any other citizen."* (326 U.S. at 508-509.)

It thus abundantly appears that the subject Act violates the First and Fourteenth Amendments in two different but interrelated aspects: it prohibits both the dissemination to and reception by the public of material of general interest.

5. The Act Evidences, Not a Valid Attempt to "Regulate" a Business, but Rather an Attempt to Suppress a Qualified Medium for the Dissemination of News, Views and Entertainment.

Here, as in *Near v. Minnesota, supra,* 283 U.S. 697, 711, 712, the Court is entitled to look at realities; and here, as there, the object of the statute is suppression of the offending media, which "suppression is accomplished by" the terms of the statute; and, most important of all, here, as there, "restraint is the object and purpose of the statute."

These principles lead to the destruction of two basic propositions advanced by our adversary. These are, first, that because commercial disseminators of news and other matters are subject to police power regulations as to their business affairs, this somehow gives the State of California a license to suppress free speech by a statute *having that object and purpose. Cf. Near v. Minnesota, supra,* 283 U.S. at 708.

The Federal Communications Commission of course has power to grant, revoke and suspend licenses for over-the-air transmission. This is a matter of regulation of a business; no more and no less. But neither the Federal Communications Commission, nor Congress nor any state has the power, wholly unrelated to regulation of business *qua* business, to dictate what a newspaper or a broadcasting station shall say in the way of news, opinion, or entertainment, or how it shall say it, or least of all, prevent it from saying it at all. In other words, appropriate authority may regulate, it may tax, but it may not in the guise of either suppress news or other dissemination to the public merely for suppression's sake alone.

Mr. Justice Sutherland exposed a similar masquerade when he said, speaking for the Court in *Grosjean v. American Press Co., supra,* 297 U.S. 233:

> ". . . The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, *it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.* A free press stands as one of the great interpreters between the government and the people. *To allow it to be fettered is to fetter ourselves.*" (297 U.S. at 250.)

So here, the short answer is that regulation *as* regulation of business may be one thing, but suppression as suppression is something else entirely and as such condemned by the First Amendment.

Breard v. Alexandria, supra, 341 U.S. 622, is relied upon by petitioner in this connection. That case sustained, as against First Amendment attack, a local ordinance prohibiting, and denominating a nuisance, door-to-door solicitations for magazine subscriptions without consent of the home owner. The court held, so far as free speech is concerned, that the great guarantees of free speech do not extend to forcing a community to admit the solicitors of publications to the home premises of its residents. The rationale of the decision was that door-to-door solicitation might properly be considered as a nuisance not involving utterances subject to protection (the magazines, when they arrived, contained those) and hence subject to reasonable regulation.

Here, of course, pay television is an *invitee* in and to the home, not a doorbell ringing nuisance. Pay television makes its appearance only if and when the householder so elects.* And here, the suppression is aimed directly at the utterance: the dissemination itself. *Breard* would, we apprehend, have resulted in quite a different holding had the ordinance in question barred the delivery to, or reception of, magazines previously subscribed for to the home which, in essence, is the case here. If it is of any aid whatever in the instant case, *Breard*, by contrast, aptly illustrates the wholesale invasion of free speech perpetrated by the subject Act. *Cf. Marsh v. Alabama, supra*, 326 U.S. 501.

Associated Press v. United States, 326 U.S. 1, with its advocacy of "the widest possible dissemination of information from diverse and antagonistic sources" (326 U.S. at 20) also is of more aid in illustrating the vices of the subject Act than in demonstrating its nonexistent virtues.

Clearly, the attempt to masquerade suppression in the guise of regulation will not do. Our adversary might as well argue that a statute prohibiting the sale of newspapers in the State of California would not transcend free speech limitations.

6. The Suppression of Freedom of Speech and of Expression Implicit in the Act Is Wholly Without Justification or Excuse.

Petitioner's contention that the test here applicable is the so-called *ad hoc* balancing test rather than the clear and present danger test is wholly refuted by the

*It will be recalled that Breard was arrested solely because he had not obtained the consent of the homeowners involved. (341 U.S. at 624.)

holdings in each and all of the cases earlier cited herein where the restraint or suppression was, as here, direct and imposed in advance. See, *e.g., Near v. Minnesota, supra,* 283 U.S. 697; *Joseph Burstyn v. Wilson, supra,* 343 U.S. 495; *Winters v. New York, supra,* 333 U.S. 507; and *Bantam Books, Inc. v. Sullivan, supra.* 372 U.S. 58.

Cases dealing with indirect or peripheral restraints, calling for the *ad hoc* balancing of the public interests involved, are therefore of no value here. *Breard v. Alexandria, supra,* 341 U.S. 622, cited, as earlier noted, by petitioner, is as good an example as any of the application of the balancing test. There was involved in that case, not the direct suppression of the sale of the periodicals involved—which is, in essentials, our case—but rather the conduct of the salesmen in trespassing upon private property against the will and without the consent of the property owner. As earlier pointed out, had Alexandria attempted to bar the sale or distribution of periodicals within its borders—which again, in essentials, is what California has purported to do here—the suppression would have been direct, as it is here and as it was, for instance, in *Marsh v. Alabama, supra,* 326 U.S. 501.

For the rest, the opinion of the California Supreme Court adequately points out the flimsiness of the justifications advanced by the statute itself, § 2, as an excuse for its existence; and the opinion also correctly points out the overbreadth of the Act even if credence be given to the speculative and illusory reasons advanced by it for its existence. Petition, Appendix B, 26-28; *cf. Shelton v. Tucker,* 364 U.S. 479, 488.

The result is that even if the *ad hoc* balancing test, rather than the clear and present danger criterion, were

to be applied in the present case, the Act would still be found wanting. As earlier noted, due to its direct and prior restraints of expression, the statute comes before this Court bearing a heavy presumption against its validity. And every case which we have earlier cited herein as bearing upon such restraints attests that such presumption is here not only not dispelled, it is fortified, under any test.

It is therefore respectfully suggested that, as to the merits, the California Supreme Court acted wholly in accord with applicable decisions of this Court in holding the Act invalid as a flagrant attempt to transgress the freedoms of speech and of the press guaranteed by the First Amendment.

Conclusion.

For all the reasons hereinabove given, this amicus curiae respectfully suggests that the decision of the Supreme Court of California rests upon the adequate and independent nonfederal ground that the subject Act is violative of the guarantees of free speech contained in the California Constitution; that in any event the holding of that court as to the invalidity of the Act under the First and Fourteenth Amendments is wholly in accord with applicable decisions of this Court; and that, accordingly, certiorari should be denied.

Respectfully submitted,

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